No. 13-20-00261-CV

In The Court Of Appeals
Thirteenth District Of Texas At Corpus Christi

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO POLICY NO. NAJL05000016-H87, as Subrogee of Momentum Hospitality, Inc. & 75 and Sunny Hospitality d/b/a Fairfield Inn & Suites,
Plaintiff-Appellant

v.

MAYSE & ASSOCIATES, INC.
Defendant-Appellee.

Plaintiff-Appellant's Reply Brief On Appeal

Oral Argument Requested

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I. INTRODUCTION

In its Appellee's Brief, Defendant-Appellee Mayse & Associates, Inc. ("Mayse") asks this Court to play the role of the Texas Legislature, and amend *Tex. Civ. Prac. & Rem. Code* §150.002. Specifically, it wants this Court to add the word "same" into the phrase "practice in the area of practice," despite the fact the Legislature struck that word from §150.002 in 2009. Clearly, this is something no court can do.

This appeal is governed by §150.002 as written. As Plaintiff-Appellant Certain Underwriters at Lloyd's of London ("Underwriters") established in their Appellant's Brief, §150.002 only requires that a third-party professional providing a Certificate of Merit practice in the general area of practice as the defendant. She/he does not need to practice in the same area as the defendant.

Here, Mayse's general area of practice is architectural work connected with commercial structures (such as hotels). Getting any more specific than that would require rewriting §150.002 to require practice in the same area as Mayse.

As detailed in Underwriters' Appellant's Brief, Mr. Itle satisfies this *Tex. Civ. Prac. & Rem. Code* §150.002 requirement in two different ways. First, Underwriters' allegations against Mayse are partially based on Mayse's failures in supervising/monitoring the construction of the Hotel to make sure it was erected in accordance with architectural plans and applicable building codes. Part of Mr. Itle's

practice is in a similar role -- peer review and technical support services to other architects and professionals during design for new construction. Mayse chooses to ignore this whole point in its Appellee's Brief, and its silence speaks volumes. On this unchallenged basis alone, the District Court's decision should be reversed.

Second, another part of Mr. Itle's current practice is forensic architecture. This certainly is within Mayse's general area of practice. Utilizing various architectural rules and principles, Mayse either designs commercial buildings or (as architect of record) makes sure the building is constructed in an architecturally sound and proper manner. Utilizing those exact same architectural rules and principles, Mr. Itle determines where an architectural design (or the subsequent construction) of a commercial building went wrong, leading to property damage.

Mayse provides no substantive response, simply dismissing the forensic/design similarity issue as being of "no moment." However, the District Court focused almost exclusively on the forensic/design issue, incorrectly finding design activities were so different from forensic work that both could not be considered part of Mayse's general area of architectural practice. Mayse makes no attempt to defend this finding, and the District Court's clear error in this regard is yet another reason why its dismissal of Underwriters' case should be reversed.

II. ARGUMENT

A. Mayse's Construction Of *Tex. Civ. Prac. & Rem. Code* §150.002 Is Fundamentally Flawed

Prior to 2009, *Tex. Civ. Prac. & Rem. Code* §150.002 required that a third-party professional providing a Certificate of Merit practice "in the same area of practice" as the defendant. As a consequence of a 2009 (and subsequent 2019) amendment to that statute, the third-party professional must now practice "in the area of practice" as the defendant. *Tex. Civ. Prac. & Rem. Code* §150.002(a)(3). The word "same" no longer modifies the term "area of practice."[1] Consequently, §150.002 only requires the third-party professional practice in the defendant's general area of practice (as opposed to practicing in the defendant's specialty).

Mayse takes a different -- and rather extraordinary -- approach. It contends "area of practice" is no different than "same area of practice," so this Court should judicially rewrite the statute and add the word "same" back into §150.002(a)(3).

Needless to say, this approach is absolutely improper. To start, many courts that examined the Legislature's removal of the word "same" from §150.002(a)(3) have correctly found it to be far from inconsequential:

[1] This is hardly an oversight by the Legislature. When it wants to use the word "same" in §150.002, it freely does so. For example, in §150.002(a)(2), the statute also requires the third-party professional hold "the same professional license or registration" as the defendant. [Emphasis added]. So while Mr. Itle must hold the same license as Mayse (which he does), he does not need to practice in the same area.

> The statute does not state that the affiant's knowledge must relate to the same, much less the same specialty, area of practice. . .[A]gain, the statute no longer requires that the affiant "practice" in the "same" area.

Dunham Engineering, Inc. v Sherwin-Williams Company, 404 S.W.3d 785, 794 (Tex. App. - Houston [14th Dist.] 2013, no pet.). *See also H.W. Lochner, Inc. v Rainbo Club, Inc.*, No. 12-17-00253-CV (Tex. App. - Tyler 2018, no pet.)(2018 W.L. 2112238, at *3); *Gaertner v Langhoff*, 509 S.W.3d 392, 396-398 (Tex. App. - Houston [1st Dist.] 2014, no pet); *BHP Engineering and Construction, L.P. v Heil Construction Management, Inc.*, No. 13-13-00206-CV (Tex. App. - Corpus Christi-Edinburg 12/5/13, no pet.)(2013 W.L. 9962154, at *5); *Morrison Seifert Murphy, Inc. v Zion*, 384 S.W.3d 421, 426-427 (Tex. App. - Dallas 2012, no pet.).

Furthermore, what Mayse is asking this Court to do is contrary to fundamental Texas principles of statutory construction. In interpreting a statute, a court must presume that every word has been used for a purpose, and, just as important, every word excluded was excluded for a purpose. *Pedernal Energy, LLC v Bruington Engineering, Ltd.*, 536 S.W.3d 487, 491-492 (Tex. 2017). Therefore, a court is forbidden from imposing its own judicial meaning on a statute by adding words (such as the word "same") not contained in the statute's language. *Texas Department of Criminal Justice v Rangel*, 595 S.W.3d 198, 210 (Tex. 2020).[2]

[2] Mayse violates rules of statutory construction in another respect as well. Based on a 6/12/19 Bill Analysis of §150.002, it argues the word "same" should be read into the statute as that is what the Bill's Author intended. This is improper because 1) extrinsic evidence cannot be used

Mayse contends that in *Levinson Alcoser Associates, L.P. v El Pistolón II, Ltd.*, 513 S.W.3d 487 (Tex. 2017), the court applied a "same" area of practice requirement to §150.002. Mayse claims the court said "area of practice" is defined by the specific work at issue in the underlying litigation.

Mayse is quite mistaken. No where in *Levinson Alcoser* does the court impose any such specificity requirement on the applicable "area of practice." In reality, all *Levinson Alcoser* holds is that it is not enough that a third-party professional simply hold the same license as the defendant. Something more is required in order for the professional to be knowledgeable in the defendant's area of practice (or, applied to the current version of §150.002, to practice in the defendant's area of practice):

> We conclude then that the statute's knowledge requirement is not synonymous with the expert's licensure or active engagement in the practice; it requires some additional explication or evidence reflecting the expert's familiarity or experience with the practice area at issue in the litigation. . .Because nothing exists in Payne's affidavit from which to draw an inference that Payne possessed knowledge of the defendant's area of practice beyond the generalized knowledge associated with holding the same license, we conclude Payne has not shown himself qualified to render the certificate of merit.

513 S.W.3d at 494 (underscoring added). As established in Underwriters first appeal brief, and as will be reiterated below, Mr. Itle does more than simply hold the same

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to construe unambiguous statutory language, and 2) the intent of an individual legislator -- even those of a Bill's author -- "do not and cannot describe the understandings, intentions, or motives" of the Legislature. *Texas Health Presbyterian Hospital of Denton v D.A. and M.A.*, 569 S.W.3d 126, 135-137 (Tex. 2018)

license (in architecture) as Mayse. As such, Underwriters' position on appeal is entirely in keeping with the holding in *Levinson Alcoser*.

Mayse also cites to *Jacobs Field Services North America, Inc. v Willeford*, No. 01-17-00551-CV (Tex. App. - Houston [1st Dist.] 2018, no pet.). The *Jacobs Field Services* court did in effect improperly add the word "same" back into "area of practice" in §150.002 (despite the fact the Legislature had removed it). With all due respect to that court, Underwriters submit its decision is an outlier that 1) violates hornbook rules of statutory construction, and 2) is contrary to the weight of authority from other Texas appellate courts -- including this Court -- cited above. As such, Underwriters respectfully submit this Court should give no weight to that unpublished decision.

At the end of the day, this Court should take *Tex. Civ. Prac. & Rem. Code* §150.002 as the Legislature wrote it. If Mr. Itle practices in Mayse's general area of practice, then his Affidavit satisfies the requirements of that statute.

B. The Fact Remains That The Itle Affidavit Satisfies Texas' Certificate Of Merit Statute

Mr. Itle set out his qualifications (and similarities in practice to Mayse) in Paragraph 1 of his Affidavit:

> I am a Texas licensed architect, License No. 20760. I first obtained licensure as an Architect in the State of Illinois in 2005. Since 2000, I have worked at Wiss, Janney, Elstner Associates, Inc. (WJE), where my practice has included investigation of existing buildings to diagnose problems such as water infiltration and to develop repairs, as well as

> peer review and technical support services to other architects and professionals during design for new construction.

[CR 299; App. p. 23].

Mayse's general area of practice is architectural work connected with commercial structures. In their Appellant's Brief, Underwriters explained how, for two different reasons, Mr. Itle's Affidavit establishes that he too provides architectural work connected with commercial structures. In short, Mr. Itle practices in the general area of practice as Mayse.

First, some of Underwriters' claims against Mayse arise out of Mayse's failures in supervising/monitoring the construction of the Hotel to make sure it was erected in accordance with architectural plans and applicable building codes. [FAP ¶¶43, 58, 80 (CR 152-153, 156-157, 1610; App. pp. 9-10, 13-14, 18); Itle Affidavit ¶4 (CR 300; App. p. 24)]. Mr. Itle's practice plays (in part) a similar role -- peer review and technical support services to other architects and professionals during design for new construction. [Itle Affidavit ¶1 (CR 299; App. p. 23)]. Both practices involve providing architectural support or advice during the design and construction process. As such, Mr. Itle certainly practices in Mayse's general area of practice.

Second, Part of Mr. Itle's current practice involves forensic architecture work. [Itle Affidavit ¶1 (CR 299; App. p. 23) -- "my practice has included investigation of existing buildings to diagnose problems such as water infiltration and to develop repairs]. Utilizing various architectural rules and principles, Mayse "before the fact"

either designs commercial buildings or (as architect of record) makes sure the building is constructed in an architecturally sound and proper manner. Utilizing those exact same architectural rules and principles, Mr. Itle "after the fact" determines where an architectural design (or the subsequent construction of a building) went wrong, leading to property damage. In short, Mr. Itle and Mayse both practice architecture connected with commercial structures. This is all that is required for Mr. Itle (and his certificate of merit affidavit) to satisfy *Tex. Civ. Prac. & Rem. Code* §150.002.

As already discussed above, Mayse does not substantively address (let alone refute) either reason. Mayse instead focuses almost entirely on (improperly) imposing a higher standard for the "area of practice" than the text of §150.002 requires. Consequently, if this Court agrees with Underwriters regarding either of the two undisputed points above, then the District Court's dismissal of Underwriters claims against Mayse should be reversed.

IV. CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Underwriters respectfully requests that the District Court's June 11, 2020 Oder dismissing their case against Defendant-Appellee Mayse be reversed, and this matter be remanded for further proceedings.

Respectfully submitted,

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DATED: November 5, 2020

CERTIFICATION OF COMPLIANCE

I certify that this Brief was prepared using Microsoft Word 2016, and that, according to that program's word-count function, the sections covered by Tex. R. App. P. 9.4(i)(1) contain 2,031 words.

Respectfully submitted,

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DATED: November 5, 2020

CERTIFICATION OF SERVICE

The undersigned certifies that a copy of Plaintiff-Appellant's Brief on Appeal was served on the attorneys of record of all parties to the above appeal via Texas Court's e-filing system, which sends notice to counsel of record on the 5th day of November, 2020.

/s/ Davette R. Seldon
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